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## CITATIONS





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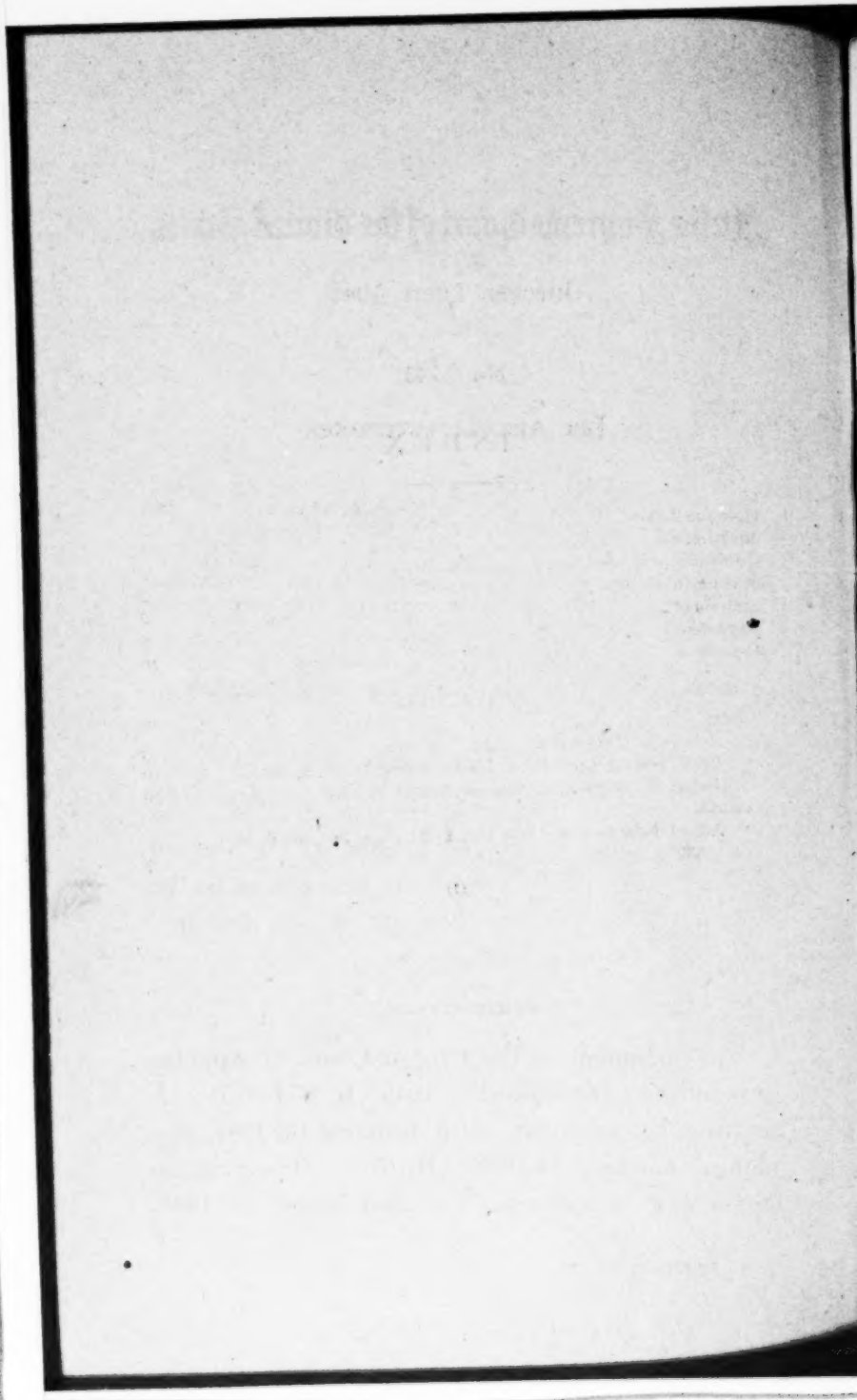

# In the Supreme Court of the United States

OCTOBER TERM, 1946

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No. 1141

LEE ARENAS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the District Court is reported in 60 F. Supp. 411. The opinion of the Circuit Court of Appeals (R. 612–674) is reported in 158 F. 2d 730. The parts thereof which are here pertinent are at R. 666–672.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 12, 1946 (R. 674–675). A petition for rehearing, filed January 13, 1947, was denied January 14, 1947 (R. 675). The petition for a writ of certiorari was filed March 19, 1947.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether the instructions pursuant to which an employee of the Department of the Interior allotted lands on the Palm Springs Reservation of the Mission Indians authorized him to select allotments for Indians who refused to choose for themselves.

2. Whether as a result of unauthorized acts of an agent upon which no reliance was put, the United States is estopped from denying the invalidity of what the agent tried to accomplish.

## STATUTE INVOLVED

The pertinent parts of section 2 of the Act of February 8, 1887, 24 Stat. 388, 25 U. S. C. 332, are set forth in the Argument (p. 7, *infra*).

## STATEMENT

On March 27, 1923, the Commissioner of Indian Affairs authorized H. E. Wadsworth to allot the lands of the Agua Caliente or Palm Springs Reservation of the Mission Indians (R. 412–413). He directed Wadsworth to act under instructions (R. 391–395) which provided (R. 393): "The allotments * * * will be made under the provisions of the Act of Congress of February 8, 1887 [24 Stat. 388], as amended by the Act of

June 25, 1910 [36 Stat. 855], and supplemented by the Act of March 2, 1917 [39 Stat. 969, 976]." The instructions further provided (R. 394): "Each Indian who has reached the age of discretion should be permitted to select his own allotment, but the selections for minors may be made by the parents, if living, or by some other person whom you regard as competent to do so. Selections for orphans should be made by you."

Francisco Arenas and Simon Arenas were adult members of the Palm Springs Band (R. 72–73, 77). They protested against allotments (R. 176). And, because they refused to make selections, Wadsworth (to adopt the expression he used at the trial) "arbitrarily" selected for them lands on which they were living (R. 172).[1] On June 21, 1923, he prepared and forwarded to Washington a schedule of the purported allotments (R. 63, 65).

Wadsworth also issued to each Indian a certificate which recited that the Indian had selected the land picked out for him (R. 180, 183). Simon Arenas refused to accept delivery of the certifi-

[1] The Circuit Court of Appeals observed (R. 670): "Indeed, the court below, which seems to have been (R. 168, 169) impressed with Wadsworth and his 'good memory', felt compelled to say frankly: 'Special Allotting Agent H. E. Wadsworth, on or about June 21, 1923, evidently being of the opinion that the Indians' likes and dislikes had nothing to do with their receiving their allotments, and that they would be thrust upon them regardless of their wishes in the matter, concluded the preparation of a schedule,' etc. (60 F. Supp. at Page 415)."

cate made out for him (R. 180–181). Francisco Arenas apparently received his certificate but returned it to Wadsworth (R. 179–180). Later, upon receipt of telegraphic advice from Washington that there was no objection to Indians preparing their selected allotments for crops "If Properly Listed on Schedule" (R. 524), Wadsworth told the Indians they had become owners and could improve the properties (R. 74–75, 79). Francisco died October 4, 1924, and Simon February 25, 1925 (R. 73). On and before June 21, 1923, "and at all times subsequent thereto," the lands were nominally improved (R. 74, 78).

The 1923 schedule was never approved. On December 22, 1926 (i. e., after the deaths of Francisco and Simon), the Commissioner of Indian Affairs advised the Secretary of the Interior that five allotment schedules, including the one for the Palm Springs Reservation, were pending (R. 525) and recommended that his office be authorized to revise them "so as to eliminate the names and selections of those Indians who do not desire allotments at this time" (R. 527). The Secretary approved the recommendation (R. 528) and on January 8, 1927, the allotment schedules were returned to Wadsworth with instructions to obtain the written consents of all Indians desiring allotments and to place their names on entirely new schedules (R. 529–531).

Thereafter, Wadsworth informed the Commissioner that several of the Indians had died since

the 1923 schedule was prepared and asked whether heirs could request approval of allotments of "relatives now deceased, who had complied with the rule and acquiesced in the selections made at that time" (R. 243). The Commissioner replied that it would not be necessary to obtain the consent of living allottees to the approval of selections "regularly made for Indians now deceased" (R. 244). Wadsworth included the names of Francisco and Simon Arenas on the schedule he prepared and forwarded to Washington on May 8, 1927.

In 1941, the petitioner brought this suit seeking the award to him of trust patents for allotments selected by him and his deceased wife in 1927 and also for the lands selected by Wadsworth for Francisco and Simon Arenas. At the time suit was brought the Secretary of the Interior had not yet passed on the 1927 schedule. A motion by the United States for summary judgment of dismissal was granted. The Circuit Court of Appeals affirmed. 137 F. 2d 199. This Court granted certiorari, 320 U. S. 733, and on May 22, 1944, reversed the judgment and remanded the cause to the trial court for further proceedings. *Arenas* v. *United States,* 322 U. S. 419.

Thereafter, the Assistant Secretary of the Interior disapproved the 1927 schedule (R. 340). However, after trial the District Court entered

judgment that petitioner was entitled to a trust patent for each of the four parcels, the patents to be effective as of June 21, 1923, the date of the first schedule (R. 90–96). The Circuit Court of Appeals held (R. 666–672) that the four Indians did not acquire any rights under the 1923 schedule because Wadsworth had made the selections for them and he was not authorized to do so and that, since Francisco and Simon Arenas had acquired no rights to trust patents, they were erroneously included in the 1927 schedule which was prepared after their death. Accordingly, so much of the judgment as directed issuance of trust patents for allotments to them was reversed. That part of the judgment in favor of petitioner on account of allotments selected by him and his deceased wife in 1927 was modified to make the patents effective as of May 9, 1927, the date of the second schedule.[2]

## ARGUMENT

1. As has been shown (pp. 3–4, *supra*), Francisco and Simon Arenas protested against allotments, refused to make selections and declined to retain certificates issued by Wadsworth stating that they had made selections. Nontheless, petitioner

[2] The greater part of the opinion below (R. 613–665) is devoted to the holding that petitioner was entitled to trust patents for the allotments selected by him and his wife in 1927.

asserts (pp. 9–22) that, by virtue of what Wadsworth did, they acquired a right to have trust patents for the lands in question. He argues (pp. 10–14) that Wadsworth was authorized by his instructions to select allotments for Indians who did not want them. Thus, from the fact that Wadsworth was told that allotments were to be made pursuant to the Act of February 8, 1887, 24 Stat. 388, petitioner infers he was vested with authority which section 2 of that Act empowered the Secretary of the Interior to confer. So far as material that section provides:

> That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, * * *. *Provided,* That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

Thus the proviso of the section empowers the Secretary of the Interior to appoint an agent to

select allotments for Indians who fail to choose for themselves. But the mere existence of the power obviously did not result in its delegation to every subordinate of the Secretary. As the court below held (R. 669) and petitioner seemingly concedes (p. 13), it was necessary for the Secretary to direct Wadsworth to select allotments for Indians who refused to do so. Admittedly, there was no express direction. Petitioner therefore infers that it was given. He draws this inference from the fact that Wadsworth's instructions cite the Act of February 8, 1887, containing the section which provides for it. However, there is no room for inference as to the method by which selections were to be made. The instructions specifically deal with the matter. And, in accord with section 2, they provide that adults should make their own selections. But, although the proviso of section 2 empowered the Secretary to authorize Wadsworth to select for adults who failed to do so, the instructions contain no such authorization. This omission constitutes a denial of the authority, which is quite as plain as an express refusal thereof. If this were not so, a failure to refuse authority would be deemed a deelgation of it. The court below rightly held that Wadsworth was not authorized to select allotments for Francisco and Simon Arenas.

Since Wadsworth was not authorized to make selections for unwilling Indians, there is no

foundation for petitioner's arguments (pp. 15–18) to the effect that until the 1923 schedule was returned to Wadsworth the attitude of the Department confirmed Wadsworth's authority to make such selections and that the ultimate rejection of that schedule was the result of a change of policy. The assertion (pp. 19–20) that the inclusion in the 1927 schedule of the names of Francisco and Simon Arenas constituted administrative recognition that they had acquired rights to trust patents is premised upon the same error as to Wadsworth's power. Moreover, when regard is had to the correspondence between Wadsworth and the Commissioner of Indian Affairs (see pp. 4–5, *supra*) it is plain that Wadsworth was informed that he could place on the schedule names of deceased Indians whose selections had been "regularly made." Obviously, this did not permit inclusion of selections made without authority. Wadsworth's act in listing the two dead Indians was as erroneous as the selections he had purported to make for them.

2. There is no merit in the assertion (pp. 23–26) that the United States is estopped to deny the rights of Francisco and Simon Arenas to trust patents for the lands selected for them by Wadsworth. As petitioner recognizes (p. 25) "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be

done what the law does not sanction or permit." *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *Yuma Water Assn.* v. *Schlecht,* 262 U. S. 138, 144. The acts of Wadsworth in selecting lands for these two Indians were done without authority of the Secretary of the Interior. Consequently, there is no basis for a claim that the United States was bound by these Acts nor by subsequent statements or conduct of Wadsworth which might indicate his belief that he had acted lawfully. Furthermore, there is no evidence that the Indians acted or refrained from acting because of anything Wadsworth said or did. Petitioner's intimations (pp. 5, 11, 18, 24) that thereafter they improved the properties are without record support. On the contrary, as the district court found (R. 74, 78), Francisco and Simon Arenas "on the 21st day of June 1923, and for some time prior thereto and at all times subsequent thereto" had made upon the lands improvements of nominal value.

## CONCLUSION

So much of the decision of the court below as is here attacked by petitioner is correct and pres-

ents neither a conflict of decisions nor any question of general importance. The petition for a writ of certiorari should therefore be denied.[3]

Respectfully submitted.

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*Attorney.*

APRIL 1947.

[3] Simultaneously herewith, the Government is filing a conditional cross-petition for certiorari, in the event that the petition herein should be granted, to review that part of the judgment below which holds that Lee Arenas is entitled to trust patents for allotments to himself and his deceased wife.

U. S. GOVERNMENT PRINTING OFFICE: 1947